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IN THE

Supreme Court of the United States

OCTOBER TERM — 1970

No. 1195

RICHARD AUSTIN GREENE,

Petitioner

vs.

THE HONORABLE OLIVER C. MAXWELL,
as Circuit Judge of the Thirteenth Judicial Circuit
of the State of Florida, in and for Hillsborough County,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEALS OF FLORIDA, SECOND DISTRICT

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IN THE

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No. _____

RICHARD AUSTIN GREENE,
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vs.

THE HONORABLE OLIVER C. MAXWELL,
as Circuit Judge of the Thirteenth Judicial Circuit
of the State of Florida, in and for Hillsborough County,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEALS OF FLORIDA, SECOND DISTRICT

The Petitioner Richard Austin Greene respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the District Court of Appeal of Florida, Second District, entered in this proceeding on April 17, 1970.

OPINION BELOW

The opinion of the District Court of Appeal is reported at 234 So.2d 690 (1970), and is reprinted in the Appendix hereto at page 1-A. The Order of the Supreme Court of Florida denying certiorari is not yet reported and is set out in the Appendix at page 1-B.

JURISDICTION

The judgment of the District Court of Appeal of Florida, Second District, was entered on April 17, 1970 and petition for rehearing was denied by Order of May 27, 1970. A timely petition for certiorari was denied by the Supreme Court of Florida on October 8, 1970, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(3)

QUESTIONS PRESENTED

1. Whether the State of Florida may re-try petitioner again for first degree mu.ler after his previous conviction following an errorless trial was reversed on the sole ground of insufficiency of evidence to support the charge.

2. Whether the determination of the Supreme Court of Florida that ". . . the evidence was definitely lacking in establishing beyond a reasonable doubt that the defendants committed first degree murder" amounts to res judicata or collateral estoppel so as to prohibit the State from again submitting that evidence in a second trial on the same charge.

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States, Amendment V ". . . nor shall any person be subject twice for the same offense to be put twice in jeopardy of life or limb."

Constitution of the United States, Amendment XIV, Section I ". . . no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State

deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

Richard Austin Greene, together with Jose Manuel Sosa, a co-defendant, was indicted on a charge of first-degree murder in Hillsborough County, Florida. The trial court adjudicated him insolvent and appointed counsel. He was tried, convicted and sentenced to death.

The Supreme Court of Florida reversed the conviction of defendant Greene, petitioner herein, in a brief per curiam order, which is set out below in its entirety:

> "PER CURIAM
>
> After a careful review of the voluminous evidence here we are of the view that the evidence was definitely lacking in establishing beyond a reasonable doubt that the defendants committed murder in the first degree, and that the interests of justice require a new trial. The judgments are accordingly reversed and remanded for a new trial.
>
> It is so ordered."[1]

On remand, the State sought to set the case for a second trial on the same charge in the same Court. Petitioner then filed a Motion to Transfer Jurisdiction

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[1] *Sosa vs. State,* 215 So.2d 736 (Fla. 1968). Ervin, J. filed a separate concurring opinion. Petitioner did not brief or argue the insufficiency of evidence in his original appeal to the Florida Supreme Court, but Rule 6.16(b) Florida Appellate Rules, requires the Court to review the sufficiency of evidence in every appeal where the defendant has been sentenced to death.

to the Criminal Court, Hillsborough County, Florida, asserting that the Circuit Court, which has jurisdiction only in capital cases, was precluded from re-trying petitioner on a charge of first degree murder. Petitioner raised defenses of double jeopardy and res judicata and contended that re-trial must be had on a charge of second degree murder or some other lesser offense, whose jurisdiction lay in the Criminal Court.

The motion was denied and petitioner moved in the District Court of Appeal for a writ of prohibition to prevent a second trial on a charge of first degree murder, asserting the defenses of double jeopardy and res judicata or collateral estoppel as a bar. The District Court of Appeal considered and rejected petitioner's claim that he was being placed twice in jeopardy in violation of his Constitutional rights. Although briefed and argued, the Ditrict Court of Appeal did not speak to the question of collateral estoppel or res judicata in its opinion.

The Supreme Court of Florida declined certiorari without opinion on the merits. Petitioner now brings this petition for a writ of certiorari to review the opinion of the District Court of Appeal denying prohibition of a second trial for first degree murder.

REASONS FOR GRANTING THE WRIT

1. *The appellate determination that certain facts are insufficient evidence to support a conviction should prohibit a second trial on the same charge under the doctrine of Ashe vs. Swenson.*

It is now beyond question that the double jeopardy protection of the Fifth Amendment may be enforced

against States through the Fourteenth Amendment. *Benton vs. Maryland*, 395 U.S. 784. Petitioner seeks to avail himself of this protection, urging that the State of Florida may re-try him on a charge of second degree murder or some other charge, but it should not be permitted to re-try him for first degree murder. The judicial determination that certain facts are insufficient to support a conviction is a determination for the purposes of res judicata or collateral estoppel, and may not, under the reasoning of *Ashe vs. Swenson,* 397 U.S. 436, 90 S.Ct. 1189 (1970), be re-submitted for a second examination by a jury, because the double jeopardy protection of the Fifth Amendment precludes such re-examination.

In *Ashe vs. Swenson,* a jury - though not instructed to elaborate upon its verdict - found the defendant "not guilty due to insufficient evidence." A second prosecution for the same offense, arising out of the same facts, but allegedly against another victim, was set aside by this Court on the grounds that the second prosecution necessarily entailed a reconsideration of certain facts found to be insufficient to support conviction in the earlier prosecution.

The situation herein is stronger and falls not only within the majority opinion, but also within the limits set by Chief Justice Burger in his dissent.

In *Ashe,* the second prosecution was on a charge not identical to the first charge because it involved the charge of a crime against a victim not the subject of the first prosecution. The majority reasoned, however, that the finding of "not guilty" necessarily resulted in a determination of certain facts in such a manner, namely the presence of the defendant at the scene of

the crime, that the prior determination by the jury estopped a second trial or examination of these same facts. The Chief Justice would have found the doctrine of collateral estoppel inapplicable because the second offense was a charge of a crime against a different victim, one of several.

The finding of the Supreme Court of Florida that evidence against petitioner Greene was clearly insufficient ought to be on the same footing with that of the first *Ashe* jury that the defendant was not guilty due to insufficient evidence.

An appellate determination that the evidence is insufficient is of equal dignity with that of a jury for purposes of res judicata or collateral estoppel. *Sealfon vs. U. S.*, 332 U.S. 575, 68 S.Ct. 237, 92 L.Ed. 180, *Sapir vs. U. S.*, 373, 75 S.Ct. 422, 99 L.Ed. 426, (1955). Following *Sapir,* one Court held an appellate determination of evidentiary insufficiency in no way inferior to a jury's determination:

> "The effect of a reversal for lack of evidence to support a conviction is not different from an acquittal by the jury and requires that the defendant be discharged." *State vs. Moreno,* 69 N.M. 113, 364 P.2d 594, (1961).

Of course, if the State of Florida elected to prosecute petitioner for second degree murder or manslaughter, the doctrine of res judicata or collateral estoppel would not apply, these charges being separate and distinct. *Ex Parte Vickery,* 51 Fla. 141, 40 So. 77 (1906), *Vasquez vs. State,* 54 Fla. 127, 44 So. 739 (1970).

An issue of ultimate fact - petitioner's guilt on a charge of first degree murder - having been determined

by a valid and final judgment in the form of a per curiam opinion of the Supreme Court of Florida, that issue may not be relitigated between the State of Florida and the petitioner.

2. *The double jeopardy protection of the Constitution prohibits states from attempting to improve their evidence in a second prosecution where the previous conviction was reversed solely for insufficiency of evidence.*

More than seventy years ago, this Court noted that the Fifth Amendment prohibits not only double punishment, but double jeopardy or double prosecution for the same offense. *Ball vs. U. S.*, 163 U.S. 662, 16 S.Ct. 1192, 41 L.Ed. 300 (1896).

Reversal for error, whether it be improper admission of evidence, improper jury instruction, or one of many other instances of error, stands in a different catagory from a reversal for pure insufficiency of evidence.

A defendant is entitled to a trial free from prejudicial error; where prejudicial error is found by the appellate court, defendant has not yet had his errorless trial and consequently it is as if there had been no previous trial at all. *Forman vs. U. S.*, 361 U.S. 416, 80 S.Ct. 481, 4 L.Ed. 2d 412 (1960).

Where the reversal is for insuffiency of evidence not involving procedural error, but constitutes a weighing by the appellate court with a determination that the evidence is wanting, then the prosecution may not, within the protection now afforded defendants in state courts by the Fourteenth Amendment, place the de-

fendant again in jeopardy on the same evidence, nor better evidence.

In the opinion below of the Florida District Court of Appeals, Judge Liles seems to argue that a re-evaluation of the same evidence by a second jury would, if a conviction resulted, prove reassuring to the Florida Supreme Court, who originally concluded that the evidence was insufficient.

The distinction between reversal for error, with a permissible re-trial, and reversal solely for insufficiency of evidence was discussed by this Court in *Forman vs. U. S.*, 361 U. S. 416, 80 S.Ct. 481, 4 L.Ed. 2d 412, (1960) noting and distinguishing *Sapir vs. U.S.*, 348 U.S. 373, 75 S.Ct. 422, 99 L.Ed. 426 (1955).

At first blush, the opinion of this Court in *U.S. vs. Bryan,* 338 U.S. 552, 70 S.Ct. 317, 94 L.Ed. 335 (1949), would seem to give some credence to the reasoning of the District Court of Appeal, but a careful examination of that opinion, and particularly the opinion of the lower Court [*Bryan vs. U.S.,* 175 F.2d 223 (C.A. 5, 1949)] will show that the reversal therein was for procedural error in that the trial court erred in admitting certain evidence not limited as to a definite period of time and thus *Bryan* does not deal with a reversal for pure insufficiency of evidence.

Some state courts have discussed the distinction in detail. *People vs. Brown,* 99 Ill. App. 2d 281, 241 N.E. 2d 653, (1968) delineates the distinction between the reversal for pure insufficiency and the Constitutional danger of permitting the prosecution a second chance to meet its burden of proof. *State vs. Moreno,* 69 N.M. 113, 364 P.2d 594, (1961), while resting primarily on the res

judicata aspects of the problem, also points up the unfairness of a second trial on the same charge after failure of a previous conviction for insufficient evidentiary weight.

The petitioner here has nothing to gain from a second trial. The State of Florida may, however; it can perhaps produce more and better evidence on re-trial. Nor has the State promised to limit itself to two trials; it may, if permitted, again try and convict petitioner of first degree murder, sentence him to die, have the Supreme Court of Florida again reverse for insufficiency of evidence; try and convict defendant again, and so on, until either the Supreme Court of Florida finds that the evidence is sufficient, or the State wearies of its game of judicial ping-pong.

The District Court of Appeal of Florida invites the prosecution to a second trial, but its refusal to face the double jeopardy question involved cannot be justified. The double jeopardy clause of the Bill of Rights was designed to prevent exactly this sort of harrassment. *See Ex Parte Lange* (1874) 85 U.S. 872, at 876.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the District Court of Appeals of Florida, Second District.

Respectfully submitted,

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December 28, 1970

APPENDIX A

Jose Manuel SOSA, *Relator,*

v.

The Honorable Oliver C. MAXWELL, as Circuit Judge of the Thirteenth Judicial Circuit of the State of Florida, in and for Hillsborough County, Respondent.

Richard Austin GREENE, *Relator,*

v.

The Honorable Oliver C. MAXWELL, as Circuit Judge of the Thirteenth Judicial Circuit of the State of Florida, in and for Hillsborough County, Respondent.

District Court of Appeal of Florida, Second District.

April 17, 1970.

Rehearings Denied May 27, 1970.

LILES, Acting Chief Judge.

Relators, Jose Manuel Sosa and Richard Austin Greene, were indicted, tried and found guilty of murder in the first degree without a recommendation of mercy. They appealed their conviction and the Florida Supreme Court reversed with a rather confusing decision. The court, in a per curiam decision, said:

> "After a careful review of the voluminous evidence here we are of the view that the evidence was definitely lacking in establishing beyond a reasonable doubt that the defendants committed murder in the first degree, and that the interests of justice require a new trial. The judgments are accordingly reversed and remanded for a new trial." Sosa v. State, Fla. 1968, 215 So.2d 736, 737.

Justices Caldwell, Roberts and Adams dissented. Justice Ervin wrote a specially concurring opinion in which he urged reversal because of legal error. Justices Drew and Thornal joined in the specially concurring opinion.

Be that as it may, when the case came back for a new trial Sosa and Greene filed a Suggestion for a Writ of Prohibition prohibiting the trial judge from again trying Sosa and Greene of murder in the first degree. The trial judge denied their motion to transfer to the Criminal Court of Record, hence the suggestion for writ of prohibition.

The relators urge in this court that where an appellate court has reversed because of the insufficiency of the evidence it is tantamount to a finding of not guilty and to retry Sosa and Greene for murder in the first degree would constitute double jeopardy. We cannot agree with this conclusion under the facts of this case and we deny the writ of prohibition. The relators have not made a clear showing that the reversal by the Florida Supreme Court in this case was based on insufficiency of the evidence to establish an essential element or elements of the crimes charged. Rather, the reversal in this case appears to be based on a finding that the evidence, though technically sufficient, is so tenuous as to prompt an appellate court to exercise its discretion and, in the interest of justice, grant a new trial.[1]

---

[1] We construe the language in the per curiam opinion of the supreme court that the evidence was "definitely lacking in establishing [guilt] beyond a reasonable doubt" as indicating that although some evidence on all elements of the crime was present, a grave doubt that affirmance would be in the interests of justice was raised in the minds of those members of the supreme court joining in the per curiam decision. This was sufficient to prompt them to reverse and remand for a new trial. Additionally, it is conceded that fundamental insufficiency of evidence was not raised on direct appeal in the supreme court.

[1] Florida has on many occasions held that where the weight of evidence appears to the appellate court to be very weak, although apparently legally sufficient if all permissible inferences are made and certain witnesses believed or disbelieved, a new trial may be granted. In Lowe v. State, 1944, 154 Fla. 730, 737, 19 So.2d 106, 110, the court stated:

> "We have held in many cases if, after a full and careful consideration of the entire record, the ends of justice will be best subserved in granting a new trial because of the *inconclusiveness* of the testimony offered to establish the essential facts necessary to constitute the crime, then, and under these conditions and circumstances, it becomes the duty of this Court to reverse the cause for a new trial." (Emphasis supplied.)

In Skiff v. State, 1932, 107 Fla. 90, 91, 144 So. 323, the court put it thusly:

> "The evidence in the instant case * * * is far from convincing. * * *
>
> "We are convinced that justice demands a new trial."

The Florida Supreme Court spoke quite clearly in Fuller v. State, 1926, 92 Fla. 873, 110 So. 528:

> 'This court is very reluctant to interfere with the verdict of a jury on the facts. After a most careful consideration, however, of the evidence disclosed by this record, the court is of the opinion that *while there is some evidence* to identify the defendant as the guilty party, the evidence upon the essential issue of identity, taken as a whole, and considered in the light of the countervailing testimony on that question, is such that it is considered just and right that another jury should pass upon the issues made.

"The judgment is therefore reversed and a new trial granted.' (Emphasis supplied.)

See also Nims v. State, 1915, 70 Fla. 530, 70 So. 565.

[2] It therefore appears that the cases are legion to support the decision of the court in the Sosa-Greene case that where the weight of the evidence is of very dubious probative value a new trial may be granted. We do not express an opinion as to the propriety of a new trial after a reversal for lack of sufficient evidence to establish, as a matter of law, the essential elements of the crime charged. Where this situation obtains, the trial judge should have directed a verdict of acquittal. In such instances several courts have perceived an application of the double jeopardy provision of the United States Constitution that would bar retrial after appellate reversal.[2] However, in the cases discussed above reversing on the weight of the evidence, it appears there was technically sufficient evidence to withstand a motion for a directed verdict of acquittal and thus double jeopardy is not in issue.

The relators primarily rely on Green v. United States, 1957, 355 U.S. 184, 78 S.Ct. 221, 2 L.Ed.2d 199, 61 A.L.R.2d 1119. We have no quarrel with the holding in the Green case but do not believe that the case is applicable here. In the Green case the petitioner, Everett D. Green, was indicted and charged with two counts, arson and murder in the first degree. The jury returned a verdict finding defendant guilty of arson under the first count and second degree murder under the second count. The defendant appealed and the court reversed

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[2] See Sapir v. United States, 1955, 348 U.S. 373, 75 S.Ct. 422, 99 L.Ed. 426; Forman v. United States, 1960, 361 U.S. 416, 80 S.Ct. 481, 4 L.Ed.2d 412; People v. Brown, 1968, 99 Ill.App.2d 281, 214 N.E.2d 653; State v. Moreno, 1961, 69 N.M. 113, 364 P.2d 594.

his conviction of murder in the second degree. On remand the defendant was tried again for first degree murder under the original indictment, was found guilty of murder in the first degree and this was appealed and the Supreme Court reversed.

We think the holding in the Green case is proper. The jury found the defendant guilty of murder in the second degree and the Supreme Court then held that the verdict was tantamount to acquitting him of murder in the first degree. Therefore, it was in fact double jeopardy to try the defendant a second time for murder in first degree as it apparently would be in Florida pursuant to Fla.Stat. § 920.09, F.S.A.

[3] Relators urge that the Fifth Amendment prohibition against double jeopardy is made applicable to the states through the Fourteenth Amendment as held in Benton v. Maryland, 1969, 395 U.S. 784, 89 S.Ct.2056 23 L.Ed.2d 707. We agree that the Federal standards used in applying the Fifth Amendment's bar against double jeopardy are applicable to the states but we disagree that Green, supra, as relators would have us hold is controlling here.

Moreover, the relators have cited, and we have found, no cases interposing the prohibition against double jeopardy under the facts presented here. Indeed, some federal cases seem to allow a retrial after reversal even for fundamental insufficiency of evidence.[3] Indeed,

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[3] Watkins v. United States, 5th Cir. 1969, 409 F.2d 1382; Clark v. United States, 5th Cir. 1961, 293 F.2d 445; Senter v. United States, 8th Cir. 1958, 253 F.2d 310. Cf Bryan v. United States, 1950, 338 U.S. 552, 70 S.Ct. 317, 94 L.Ed. 335. But see Sapir v. United States, 1955, 348 U.S. 373, 75 S.Ct. 422, 99 L.Ed. 426 and cf. Forman v. United States, 1960, 361 U.S. 416, 80 S.Ct. 481, 4 L.Ed.2d 412.

it would constitute an anomaly in law if an appellate court could not reverse and remand for a new trial if it was of the opinion that the evidence, while legally sufficient to support the jury's verdict, was so far from convincing as to require a new trial in the interest of justice.

For these reasons the Suggestion for Writ of Prohibition is denied and the instructions as contained in the Supreme Court's decision to remand for a new trial require that the case be remanded for a new trial on the charge of murder in the first degree.

MANN and McNULTY, JJ., concur.

APPENDIX B

IN THE SUPREME COURT OF FLORIDA
JULY TERM, A. D. 1970
THURSDAY, OCTOBER 8, 1970

CASE NO. 39,878

DISTRICT COURT OF APPEAL, SECOND DISTRICT

RICHARD AUSTIN GREENE,
Petitioner,
vs.
THE HONORABLE OLIVER C. MAXWELL, ETC.,
Respondent.

This cause having heretofore been submitted to the Court on Petition for Writ of Certiorari, jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Florida Appellate Rule 4.5 c (6), and it appearing to the Court that it is without jurisdiction, it is ordered that the Petition for Writ of Certiorari be and the same is hereby denied.

It is further ordered that the petitioner's motion for allowance of attorney's fees, be and the same is hereby denied.

ROBERTS, Acting Chief Justice, DREW, THORNAL, CARLTON and ADKINS, JJ., concur